Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff,

-versus-

NELSON L. CHENG and CAROLINE T. CHENG,
Accused.

CTA CRIM CASE NO. O-297

Members:

CASTAÑEDA, JR., *Chairperson*
CASANOVA, and
MINDARO-GRULLA, ***JJ.***

Promulgated:

MAR 2 6 2013

4:20 p.m.

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RESOLUTION

Submitted for resolution is a *Motion (To Withdraw Information)* filed on March 6, 2013 by Prosecution Attorney Cesar Angelo A. Chavez III, praying that the Information for Tax Evasion and Failure to File Return, Supply Correct and Accurate Information, Pay Tax Withheld and Remit Tax and Refund Excess Taxes Withheld on Compensation under Section 255[1] of the National Internal Revenue Code of 1997, as amended, against the two (2) accused Nelson L. Cheng and Caroline T. Cheng, be withdrawn.

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[1] **SEC. 255. Failure to File Return, Supply Correct and Accurate Information, Pay Tax Withhold and Remit Tax and Refund Taxes Withheld on Compensation.** – Any person required under this Code or by rules and regulations promulgated thereunder to pay any tax make a return, keep any records, or supply correct and accurate information, who wilfully fails to pay such tax, make such return, keep such record, or supply correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, at the time or times required by law or rules and regulations shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than Ten thousand pesos (₱10,000) but not more than Twenty thousand pesos (₱20,000) and suffer imprisonment of not less than one (1) year but not more than three (3) years.

In the subject *Motion*, plaintiff alleges that during the hearing of the instant case on February 18, 2013, the Prosecution Attorney appeared for the arraignment of the two (2) accused; that he was informed by the Court that a resolution was issued by the Department of Justice which in effect, will result in the dismissal of the instant case; that not being aware of such resolution, plaintiff moved for the resetting of the hearing to substantiate said resolution; and that upon verification, the Prosecution Attorney received a resolution dated February 15, 2013 on February 18, 2013, issued by the Honorable Secretary of Justice and signed by the Honorable Undersecretary of Justice Francisco F. Baraan III. The dispositive portion of the said resolution reads as follows:

> "**WHEREFORE**, the instant petition for review is hereby **GRANTED.** The assailed resolution is hereby **REVERSED and SET ASIDE.** The Prosecutor General is hereby directed to move for the withdrawal of the information for violation of Section 255 of the NIRC against **NELSON L. CHENG and CAROLINE T. CHENG,** and to report the action taken within ten (10) days from receipt hereof."

Hence, the People filed the subject *Motion*.

After a careful study of the records of the case, in conjunction with the Resolution of the Department of Justice dated February 15, 2013, which highlighted the ineptness of the probable cause against the accused for violation of Section 255 of the NIRC, as amended, this Court finds merit in the subject *Motion.*

Suffice it to say that with regard to the allegation of undeclared income subject to income tax, it is improper to assume that the money used in the purchase of the lot was derived from undeclared corporate income, as it is in fact, a capital investment by Zacharias Cananea wherein it was poised to acquire majority of the shares of Premiere Global Links Enterprise, Inc. (PGLEI).

xxx

WHEREAS, the existing stockholders of the FIRST PARTY and the SECOND PARTY are willing to provide fresh capital under the foregoing terms and conditions, to wit:

1. The **FIRST PARTY** shall initiate to have its Articles of Incorporation amended to reflect the following changes: (a) increase in the authorized capital stocks of up to the total par value of One Hundred Million Pesos (Php 100,000,000.00), in Philippine currency; (b) inclusion of the **SECOND PARTY** as the majority stockholder with subscribes shares of fifty-one percent (51%) of the authorized capital stocks; xxx

2. The payment of the subscribed shares of the **SECOND PARTY** shall be utilized to pay the acquisition of a lot located at Magallanes, Makati City, Metro Manila xxx. The terms of the payment thereof shall be tailor fitted to the financing scheme taken out from a reputable financing institution for the said lot xxx. Xxx

3. Although the lot that will be acquired out of the payment of the **SECOND PARTY** of his subscribed shares will be in the name of the **FIRST PARTY**, the same shall be under the beneficial use and possession of the **SECOND PARTY** until such time that the amendment of the Articles of Incorporation is approved and implemented xxx.

4. In the event that the herein obligations of the **FIRST PARTY** xxx are not complied with or for any reason, with or without the fault of the **FIRST PARTY** xxx, the herein agreed conditions did not pursue or materialize, the lot bought out of the payment of **SECOND PARTY** of his subscribed shares xxx shall accrue to the ownership of the **SECOND PARTY**. For this purpose, the said lot xxx, xxx, shall be automatically assigned to the **SECOND PARTY** by operation of this agreement. (*Underscoring supplied.*)

The fact that the money paid for the purchase of the lot came as an infusion of fresh capital arising from the Conditional Investment Contract between Zacharias Cananea and PGLEI and, moreover, the fact that there were conditions in said contract that affect the full transfer of ownership of the said lot to PGLEI or, will at some point forfeit or cancel the same if such conditions were not complied with, is an import that the money was for the subscribed shares of Cananea and that the land was intended to increase the capital assets of PGLEI.

With regard to the violation of due process, there is no showing that the Revenue Officers of the Bureau of Internal Revenue complied with the procedures enunciated in Revenue Memorandum Order No. 15-95[2] dated June 9, 1995. The antecedent facts of the complaint[3] never mentioned that the Letter of Authority (LOA) was issued pursuant to a preliminary investigation by revenue officers to establish a prima facie case, as well as pursuant to a formal fraud investigation against the accused. Furthermore, nowhere in the records of the case has it been shown that prior to the issuance of an assessment notice and of the LOA, a Preliminary Assessment Notice was sent to and received by the accused. There is likewise no showing that a formal demand letter was personally served in order to afford the latter an opportunity to controvert the accusations against them.

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[2] C. Procedure

A Preliminary Investigation must first be conducted to establish the prima facie existence of fraud. This shall include the verification of the allegations on the confidential information and/or complaints filed, and the determination of the schemes and extent of fraud perpetrated by the denounced taxpayers.

The Formal Fraud Investigation, which includes the examination of the taxpayers books of account through the issuance of Letters of Authority, shall be conducted only after the prima facie existence of fraud has been established.

1. TAX FRAUD DIVISION
   1.1 Where indications of fraud have been established in a preliminary investigation, the Tax Fraud Division thru the Assistant Commissioner, Intelligence and Investigation Service (IIS), shall request/recommend the issuances of the corresponding Letter of Authority by the Commissioner which will automatically supersede all previously issued Letters of Authority with respect thereto.

[3] Docket, p. 22.

Lastly, Value Added Tax (VAT) is a tax on spending or consumption. It is levied on the sale, barter, exchange or lease of goods or properties and services. Being an indirect tax on expenditure, the seller of goods or services may pass on the amount of tax paid to the buyer, with the seller acting merely as a tax collector. The burden of VAT is intended to fall on the immediate buyers and ultimately, the end-consumers.[4] This being the case, PGLEI cannot be held liable under Section 255 of the NIRC because, under law, they are not the ones obligated to remit the subject tax to the Bureau of Internal Revenue and to make the necessary returns thereon. In the instant case, Ayala Land, Inc. is a corporate entity primarily engaged in the sale of real properties in the course of its trade or business and, as such, is the one mandated under the law to remit the tax and to file the proper return for the sale transactions it enters into because, under the VAT system, the seller acts as the tax collector.

As such, upon delivery of the contract price by PGLEI to Ayala Land, Inc., already included with it were the amounts for the stipulated taxes, costs and expenses for the transaction. All being part of the purchase price. Under Section 1 of the Deed of Sale, simultaneous with the execution thereof, the accused, as VENDEES, had delivered to Ayala Land, Inc., as VENDOR, the corresponding VAT, documentary stamp taxes, transfer taxes, registration fees, expenses, costs and other taxes in connection with the sale of the lot.

WHEREFORE, finding the Prosecution Attorney's Motion to Withdraw Information filed on March 6, 2013 to be well taken, the same is hereby **GRANTED**. Accordingly, the Information for violation of Section 255 of the NIRC against accused-Nelson L. Cheng and Caroline T. Cheng is **WITHDRAWN** and CTA Criminal Case No. O-297 entitled, "People of the Philippines v. Nelson L. Cheng and Caroline T. Cheng" is hereby **DISMISSED**.

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[4] Abakada Guro Party List v. The Honorable Executive Secretary Eduardo Ermita, G.R. No. 168056, September 1, 2005.

The scheduled arraignment of accused-Nelson L. Cheng and Caroline T. Cheng on April 17, 2013 at 9:00 am is **CANCELLED**.

SO ORDERED.

J.C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

CAESAR A. CASANOVA
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice